



Finance Circular No. 2009/08

To all Departments and Commonwealth authorities and wholly-owned Commonwealth companies under the *Commonwealth Authorities and Companies Act 1997* (CAC Act)

Application of general policies of the Australian Government to bodies subject to the CAC Act – General Policy Orders

Purpose

This Circular provides information on the process of applying a general policy of the Australian Government to relevant Commonwealth authorities and wholly-owned Commonwealth companies (relevant CAC Act bodies) through the issuing of a General Policy Order (GPO) by the Minister for Finance and Deregulation (Finance Minister) under section 48A of the CAC Act.¹

Target audience

This Circular is relevant to those officials of Departments of State and Agencies under the *Financial Management and Accountability Act 1997* (FMA Act) who might be involved in developing or implementing general policies of the Australian Government. It is also applicable to directors and officers of relevant CAC Act bodies (and the subsidiaries of these bodies) that are subject to the provisions of the CAC Act relating to general policies of the Australian Government.

What does the CAC Act say?

1. Sections 28, 43 and 48A of the CAC Act provide a mechanism for applying general policies of the Australian Government to relevant CAC Act bodies. The process was streamlined from 1 July 2008, through amendments made to the CAC Act by the *Commonwealth Authorities and Companies Amendment Act 2008* (CAC Amendment Act).²

¹ This Circular replaces *Finance Circular 2005/04: Application of general policies of the Australian Government to bodies under the Commonwealth Authorities and Companies Act 1997*.

² Items 40, 50 and 51-53 of Schedule 1 to the [CAC Amendment Act](#) amend sections 28 & 43, and introduce section 48A of the CAC Act. Paragraphs 17-29 of the [Explanatory Memorandum to the CAC Amendment Bill 2008](#) provide further information.

2. The CAC Act requires relevant Commonwealth authorities³ and wholly-owned Commonwealth companies⁴ to comply with GPOs, made under section 48A of the CAC Act.

3. Under section 48A of the CAC Act, the Finance Minister can issue a GPO, specify the relevant CAC Act bodies to which it will apply, and specify the extent to which it will apply. Sections 28, 43 and 48A are reproduced at Attachment A.

4. **Specific requirements for procurement policies:** A separate legislative power deals with compliance with government procurement requirements. Under section 47A of the CAC Act, the Finance Minister may issue procurement-related directions to those CAC Act bodies specified in Schedule 1 of the *Commonwealth Authorities and Companies Regulations 1997* (of which there are currently 20). Accordingly, directions relating to government procurement under section 47A of the CAC Act are outside the scope of this Circular.

Transitional arrangements

5. General policies of the Australian Government notified to a relevant CAC Act body under sections 28 or 43 of the CAC Act (as those sections existed prior to 1 July 2008) continue in force from 1 July 2008, until the Finance Minister makes a determination under the CAC Amendment Act that those notifications cease to be in force.⁵

What is a general policy of the Government?

6. As stated in paragraph 17 of the Explanatory Memorandum to the *Commonwealth Authorities and Companies Amendment Bill 2008* (Explanatory Memorandum): “a general policy of the Australian Government is a policy that is made by the government, usually by Cabinet or senior ministers, that applies to all or most bodies subject to the FMA Act and the CAC Act.” By contrast, if a policy is capable of being applied to only one or a few such bodies, it is unlikely that it would reasonably be regarded as a “general” policy.

7. The Department responsible for a policy (policy Department) should, when developing the policy, liaise with Finance to discuss whether it is suitable to be considered a general policy of Government and of being applied to relevant CAC Act bodies through a GPO.

³ Section 28 of the CAC Act sets out how general policies apply to Commonwealth authorities within the meaning of subsection 7(1) of the CAC Act. Note, however, that the enabling legislation for the Australian Broadcasting Corporation and the Australian National University provide full exemptions from section 28. Also, the enabling legislation for the Special Broadcasting Service Corporation and the Australian Industry Development Corporation provide for partial exemptions from general policies of the Australian Government.

⁴ Section 43 of the CAC Act sets out how general policies apply to a *wholly-owned Commonwealth company* within the meaning of subsection 34(2) of the CAC Act. A company limited by shares that is controlled by the Commonwealth, but has other shareholders, is not a wholly-owned Commonwealth company. However, a Commonwealth company that is limited by guarantee is a wholly-owned Commonwealth company even if it has other members guaranteeing the company.

⁵ Items 71 and 72 of Schedule 1 to the CAC Amendment Act state that any general policies of the Australian Government previously notified to a Commonwealth authority or wholly-owned Commonwealth company by its responsible Minister continue in force. Under item 73, the Finance Minister may make a determination that a notification or part of a notification about a general policy ceases to be in force. If a Minister responsible for an existing general policy seeks the cessation of a notification or part of a notification previously made on that policy, the Minister can write to the Finance Minister requesting such a determination.

The GPO Process

8. Generally, a Minister is responsible for developing and administering a policy (the policy Minister). Accordingly, it is appropriate for the policy Minister to consider if a policy should be applied as a general policy of the Australian Government to relevant CAC Act bodies.

9. Directors of relevant CAC Act bodies are subject to legal duties and requirements regarding their oversight of the activities of their body. Accordingly, requiring them to comply with a particular general policy of the Australian Government involves a level of rigour and consultation, to help ensure that the directors are aware of the proposed general policy and are able to comply with the general policy once issued as a GPO. For this reason, the process for developing and consulting on the application of a potential general policy is relatively detailed.

10. If a decision is made by Government to apply a policy to relevant CAC Act bodies, the policy Minister should request all responsible Ministers⁶ to consult their relevant CAC Act bodies on the application of the general policy. As noted by the Explanatory Memorandum, following the introduction of a GPO, “the policy Minister...continue[s] to oversee consultation between responsible Ministers and relevant bodies on the proposed application of the general policy”,⁷ and as such should provide all relevant documentation to the responsible Ministers and allow time for appropriate consultation. Finance can provide advice on the consultation process.

11. Following the responses of relevant CAC Act bodies, the policy Minister and responsible Ministers should settle on what exemptions (partial or full) might be granted to individual bodies. The policy Minister should then write to the Finance Minister requesting a GPO to be issued. The Finance Minister may issue a GPO if satisfied that responsible Ministers have consulted with relevant CAC Act bodies.

12. The GPO will take effect once registered on the Federal Register of Legislative Instruments, including details of the policy and its application (partial or full) to relevant CAC Act bodies.

13. A flow chart of the process is at [Attachment B](#) and further information on the process is at [Attachment C](#). A template letter for the policy Minister to provide to responsible Ministers, for consulting relevant CAC Act bodies on a general policy, is at [Attachment D](#).

Disclosure

14. Commonwealth authorities must disclose in their annual report the particulars of any general policies applying to them under the CAC Act. Clause 12 of the *Commonwealth Authorities and Companies (Report of Operations) Orders 2008* requires disclosure of continuing and new notifications of general policies applicable to the Commonwealth authority, and the extent of, and reasons for, any non-compliance with a general policy.

15. Any potential or actual non-compliance with a general policy subject to a GPO should be raised with the relevant policy Department in the first instance. Part of a director’s role in discharging his or her duties includes ensuring that their relevant CAC Act body complies with GPOs: sections 28 and 43 of the CAC Act.

⁶ Section 5 of the CAC Act defines the responsible Minister for Commonwealth authorities and Commonwealth companies.

⁷ See paragraph 20 of the Explanatory Memorandum.

List of Attachments

16. Sections 28, 43 and 48A of the CAC Act are reproduced at Attachment A.
17. A flow diagram of the GPO development process is included at Attachment B.
18. Further information on each step in the GPO development process is provided at Attachment C.
19. A template letter from a responsible Minister to their relevant CAC Act body is included at Attachment D.

Contacts

20. If you have any comments or questions regarding this Finance Circular, please contact LRB@finance.gov.au or telephone (02) 6215 3657.

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13 November 2009

Relevant CAC Act sections

28 Compliance with General Policy Orders

- (1) The directors of a Commonwealth authority must ensure that the authority complies with a General Policy Order to the extent that the Order applies to the authority.
- (2) The directors must also ensure, as far as practicable, that the subsidiaries of the authority comply with the Order to that extent.

43 Compliance with General Policy Orders

- (1) The directors of a wholly-owned Commonwealth company must ensure that the company complies with a General Policy Order to the extent that the Order applies to the company.
- (2) The directors must also ensure, as far as practicable, that the subsidiaries of the company comply with the Order to that extent.

48A General Policy Orders

Finance Minister to make General Policy Orders

- (1) The Finance Minister may make an Order (a **General Policy Order**) that specifies a general policy of the Australian Government.

Consultation before making General Policy Orders

- (2) Before making a General Policy Order, the Finance Minister must be satisfied that the responsible Ministers for the Commonwealth authorities and wholly-owned Commonwealth companies to which the Order will apply have consulted those authorities and companies on the application of the policy.

Note: The responsible Ministers may consult with the Commonwealth authorities and wholly-owned Commonwealth companies by consulting:

- (a) if the authority or company has a Chair—the Chair; and
- (b) otherwise—the directors.

Authorities and companies that General Policy Orders apply to

- (3) A General Policy Order applies to:
 - (a) if the Order is expressed to apply only to specified Commonwealth authorities or wholly-owned Commonwealth companies—those specified authorities or companies; and
 - (b) if the Order is expressed to apply to all Commonwealth authorities or wholly-owned Commonwealth companies, other than:
 - (i) specified authorities or companies; or
 - (ii) a class of authorities or companies;

all Commonwealth authorities or wholly-owned Commonwealth companies except those specified authorities or companies or those authorities or companies that are members of that class; and
 - (c) otherwise—all Commonwealth authorities or wholly-owned Commonwealth companies.

Partial application of General Policy Orders

- (4) If a General Policy Order specifies that a part of the Order does not apply to:
- (a) specified authorities or companies; or
 - (b) a class of authorities or companies;
- then that part of the Order does not apply to those specified authorities or companies or those authorities or companies that are members of that class.

General Policy Orders not subject to disallowance or sunseting

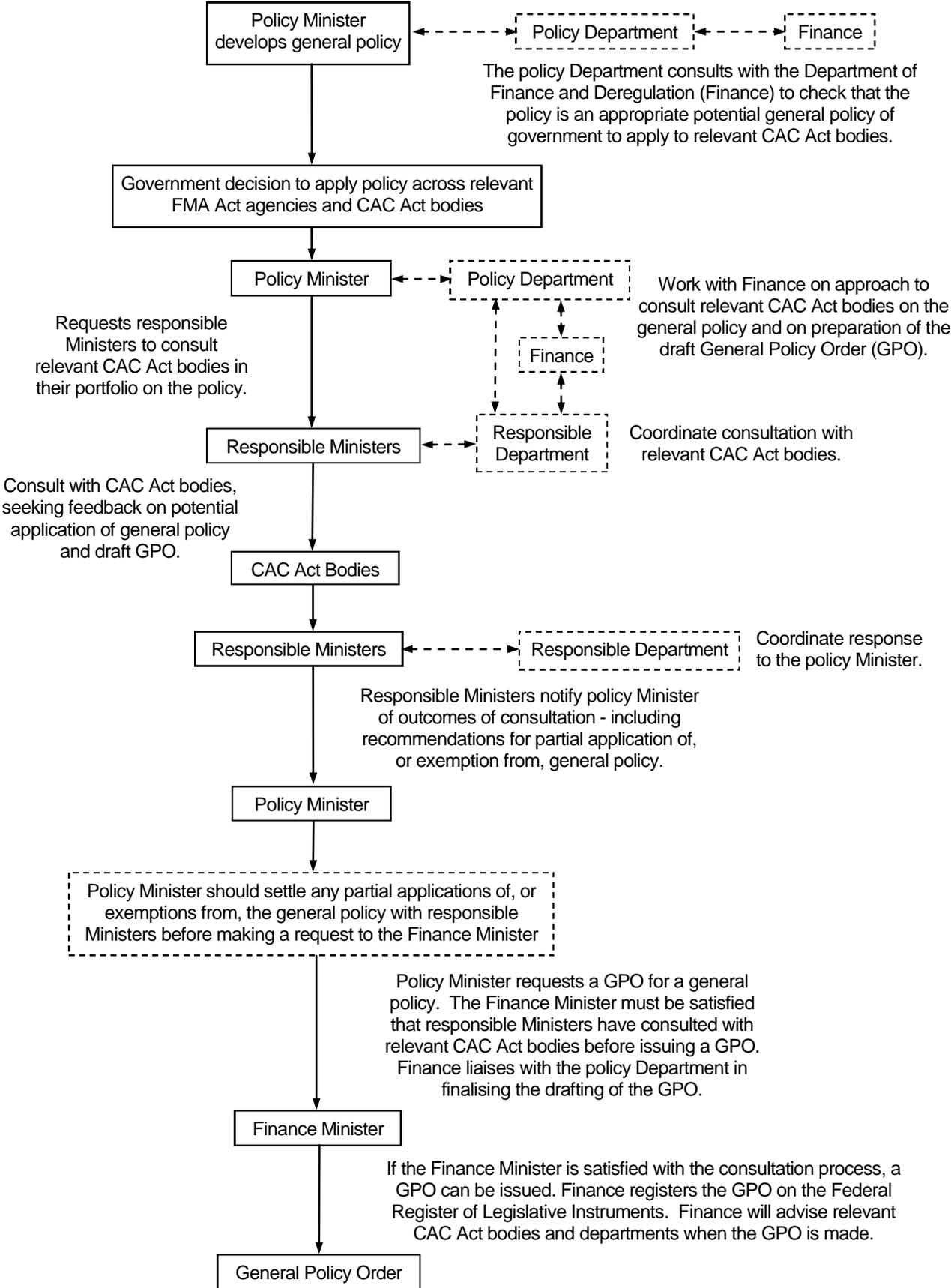
- (5) A General Policy Order is a legislative instrument, but neither section 42 nor Part 6 of the *Legislative Instruments Act 2003* applies to it.

General Policy Orders not to create offences or penalties

- (6) A General Policy Order cannot create offences or impose penalties.

Note: In relation to subsections 28(2) and 43(2), section 5 of the CAC Act defines 'subsidiary' in relation to a Commonwealth authority or Commonwealth company, to mean an entity that is controlled by the Commonwealth authority or Commonwealth company. For this purpose, entity and control have the same meanings as in the accounting standard that applies for the purpose of deciding whether a company has to prepare consolidated financial statements under the Corporations Act 2001.

General Policy Order Development Process



Guidance on developing a General Policy Order

Developing a general policy

1. As paragraph 19 of the Explanatory Memorandum to the *Commonwealth Authorities and Companies Amendment Bill 2008* (Explanatory Memorandum) noted, the introduction of General Policy Orders (GPOs) “does not change the way a general policy is developed or how consultation with Commonwealth authorities and wholly-owned Commonwealth companies occurs.” Developing a general policy is similar to developing other policies. However, the Department responsible for developing a policy (policy Department) should liaise with the Department of Finance and Deregulation (Finance) early during the development of a policy. This will assist with consideration of whether a policy is suitable as a potential general policy to apply to relevant Commonwealth authorities and wholly-owned Commonwealth companies (relevant CAC Act bodies) through a GPO.
2. If the Government decides that a policy will apply to relevant CAC Act bodies, the Minister responsible for the policy (policy Minister) should write to responsible Ministers requesting them to consult with relevant CAC Act bodies in their portfolios on the application of the general policy.
3. Before a GPO containing the general policy can be issued by the Finance Minister:
 - responsible Ministers should be able to adequately consult their relevant CAC Act bodies on the general policy; and
 - directors of relevant CAC Act bodies need to be able to assess the potential effect of the general policy on their body.¹

How does consultation occur?

4. A consultation process may involve the following steps:
 - The policy Minister requests that responsible Ministers consult with their relevant CAC Act bodies on the application of the general policy.² The policy Minister should provide relevant information on the general policy to assist with consultation. Before a request is issued, the policy Department should work with Finance to develop the documentation for consultation, including a draft GPO (to be prepared in consultation with Finance).
 - Responsible Ministers consult with their relevant CAC Act bodies on the application of a general policy.
 - a. Directors should be advised that the responsible Minister is consulting with the body on the application of a general policy of the Australian Government for the purposes of section 48A of the CAC Act. Directors should be provided with the following information:

¹ The portfolio department should coordinate this process on behalf of the responsible Minister.

² The note to subsection 48A(2) of the CAC Act provides guidance on who a responsible Minister may consult in a relevant CAC Act body.

- ♦ a full copy of the draft GPO; and
 - ♦ details about when the Australian Government intends the policy to commence (giving relevant CAC Act bodies reasonable time to implement the policy before the GPO is expected to commence).
- b. Directors should be provided with a reasonable opportunity to fully consider and discuss the effect of the policy upon the relevant CAC Act body (and its subsidiaries, if relevant) if the policy were to apply.
 - c. The question of what is a reasonable opportunity will depend upon the circumstances of the policy. A useful benchmark might be to seek a response no later than seven days after the next board meeting of the relevant CAC Act body, or two months from advising the directors of the policy.
 - d. If the directors believe the general policy should not apply (in full or partially) to their CAC Act body they should provide reasons supporting their case to their responsible Minister.
- Responsible Ministers should advise the policy Minister of the results of consultations, including any requests (with reasons) for exemption from or partial application of the general policy. The portfolio department should coordinate this process on behalf of the responsible Minister.
5. If the Finance Minister is not satisfied that all relevant CAC Act bodies affected by the general policy have been consulted, then the policy Minister may be asked to go back to responsible Ministers to consult further.

Application of GPOs and partial application of GPOs

6. A GPO only applies to the relevant CAC Act bodies it specifies. Under subsection 48A(3) of the CAC Act, a GPO can be expressed to apply to:
 - specified relevant CAC Act bodies; or
 - a particular class of relevant CAC Act bodies; or
 - if otherwise - all relevant CAC Act bodies.

Partial application

7. Under subsection 48A(4) of the CAC Act, a GPO can state that parts of it do not apply to:
 - specified relevant CAC Act bodies; or
 - a class of relevant CAC Act bodies.
8. A GPO that states that parts of it do not apply to a CAC Act body (or class of bodies) still requires the relevant CAC Act body (or class) to comply with the remainder of the GPO: subsection 48A(4).

Decisions on exemptions and partial applications

9. If the directors of a relevant CAC Act body believe a general policy should not apply in whole or in part then they should raise their views (with reasons) in their response to the

responsible Minister. The responsible Minister should make recommendations to the policy Minister on any exemptions or partial applications.

10. The policy Minister and responsible Ministers should settle whether any exemptions or partial applications are relevant.

11. The purpose of subsections 48A(3) and (4) is to recognise that it may be inappropriate for certain GPOs to be applied in full to all the activities of a particular relevant CAC Act body or its subsidiaries. For example, it may be inappropriate to require an overseas subsidiary to comply with a particular Australian Government policy.

12. A policy might explicitly state that a Minister may, in writing, provide limited exceptions to the day-to-day application of the policy. Such a power is different to those under subsections 48A(3) and (4) of the CAC Act.

Request for Finance Minister to make a GPO

13. Once the consultation period has concluded, the policy Minister should request that the Finance Minister issue a GPO on the general policy.³ The policy Department should consult with Finance on the requirements of the request. In summary, the request needs to provide:

- details of the general policy to be specified by the GPO, including the source of approval and summary of the general policy, and proposed commencement dates;
- a statement that the policy Minister is satisfied that responsible Ministers have consulted with their relevant CAC Act bodies in accordance with subsection 48A(2) of the CAC Act (with details of the process of the consultations included);
- details on the application of the GPO (with reasons for any exemptions from or partial applications of the GPO included);
- a request, if relevant, that the Finance Minister issue a determination (under item 73 of the CAC Amendment Act) to cease any notification made by correspondence regarding general policies issued before 1 July 2008; and
- a draft GPO that includes the general policy.

14. Finance, in conjunction with the policy Department, will develop the explanatory statement for the GPO based on the information supplied in the policy Minister's request.

Issuing a GPO

15. Once the Finance Minister receives a request to issue a GPO and is satisfied that subsection 48A(2) of the CAC Act has been complied with, the Finance Minister can issue a GPO. Finance will arrange for it to be registered on the Federal Register of Legislative Instruments (FRLI) along with an explanatory statement. GPOs are applicable until amended or revoked by the Finance Minister.

³ See paragraphs 22 to 24 of the Explanatory Memorandum for additional information.

16. Finance will advise the policy Department, other portfolio departments and relevant CAC Act bodies when a GPO is registered on FRLI.

Changes to a general policy

17. If the general policy changes, a new consultation process needs to be undertaken in full. That is, the Finance Minister must be satisfied that responsible Ministers have consulted with their relevant CAC Act bodies on the application of the altered general policy. Once this is complete a new GPO can be issued and the old GPO revoked by the Finance Minister.

18. Guidance can be issued on explaining, implementing and complying with a general policy that can be updated from time-to-time without issuing a new GPO. Such guidance cannot, however, seek to change the content or effect of a general policy. Accordingly, the policy Department should consider the role of guidance when developing a general policy applicable to CAC Act bodies.

Changes to a GPO's applicability

19. If the applicability of an existing GPO is required to change (for example if an exemption for a particular relevant CAC Act body needs to be granted after a GPO is made), then the Finance Minister can issue an amendment to the GPO. As with making a GPO, the Finance Minister can issue an amendment if satisfied that relevant responsible Ministers have consulted with relevant CAC Act bodies affected by the proposed changes.

Template letter for consultation

Dear Chairperson,

General policy of the Australian Government - consultation

I am writing to consult with you on the application of a general policy of the Australian Government on **<describe policy>**. This general policy has been proposed by **<insert policy Minister's title>**. The policy will potentially be applied to Commonwealth authorities and wholly-owned Commonwealth companies through a proposed General Policy Order (GPO), issued under the *Commonwealth Authorities and Companies Act 1997* (CAC Act).

Section 48A of the CAC Act provides that:

- The Minister for Finance and Deregulation (Finance Minister) may issue a GPO that specifies a general policy of the Australian Government.
- Before issuing a GPO, the Finance Minister must be satisfied that the responsible Ministers for the Commonwealth authorities and wholly-owned Commonwealth companies to which the GPO will apply have consulted those authorities and companies on the application of the general policy.
- A GPO can apply in full or in part to: all Commonwealth authorities and wholly-owned Commonwealth companies; a class of authorities or companies; or specific authorities or companies.

This letter is designed to meet the requirement for your body to be consulted on the potential application of the policy, before the Finance Minister can issue a GPO.

The policy

The policy requires **< outline key elements of the policy >**. The draft GPO is included at Attachment **<insert relevant attachment letter>**.

<Include one of the following paragraphs as relevant. Delete the other>

<For bodies with a board>

I ask that you, as chairperson, provide a copy of this policy to directors in order to consider the potential effect of the policy upon the operations of your organisation (and its subsidiaries if applicable). Any comments on the policy are welcome, including requests, with reasons, for exemptions from the application of the policy (in whole or part) that the directors may wish to seek. Your response will assist the Minister responsible for the policy, who will propose any exemptions in the application of the GPO to the Finance Minister. Your response is sought by **<insert date>**.

<For bodies with a single director>

I ask that you consider the potential effect of the policy upon the operations of your organisation (and its subsidiaries if applicable). Any comments on the policy are welcome, including requests, with reasons, for exemptions from the application of the policy (in whole or part) that you may

wish to seek. Your response will assist the Minister responsible for the policy, who will propose any exemptions in the application of the GPO to the Finance Minister. Your response is sought by **<insert date>**.

Notification procedures

The Department of Finance and Deregulation will advise affected Commonwealth authorities and wholly-owned Commonwealth companies of the commencement of any GPO arising from this process. The GPO, if made, will only take effect, in law, once registered on the Federal Register of Legislative Instruments (accessible from the Comlaw web site: www.comlaw.gov.au/comlaw/comlaw.nsf/frli). As required by the CAC Act, the GPO must state the extent of any exemptions granted to specific bodies.

Yours sincerely,

<insert name of responsible Minister>